In the case of *Karnail Singh & Anor.* v. *State of Punjab* [5] the Court said:—

"It is a question to be determined on the facts of each case whether the charge under section 149 overlaps the ground covered by section 34. If the common object which is the subject-matter of the charge under section 149 does not necessarily involve a common intention, then the substitution of section 34 for section 149 might result in prejudice to the accused and ought not therefore to be permitted. But if the facts to be proved and the evidence to be adduced with reference to the charge under section 149 would be the same if the charge were under section 34, then the failure to charge the accused under section 34 could not result in any prejudice and in such cases the substitution of section 34 for section 149 must be held to be a formal matter."

The Court then referred to its earlier decision in the case of *Lachhman Singh & Ors.* v. *The State* [6]. That was a case which was very much on all fours with the present one. Five persons had been charged with murder by reason of section 149. Three of them were acquitted, and the other two were convicted of murder by reason of section 34 although there had been no alternative charge invoking the aid of section 34. Fazl Ali, J., dealt with the point as follows (at p. 170):—

"It was also contended that there being no charge under section 302 read with section 34, Penal Code, the conviction of the appellants under section 302 read with section 149 could not have been altered by the High Court to one under section 302 read with section 34, upon the acquittal of the remaining accused persons. The facts of the case are however such that the accused could have been charged alternatively, either under section 302 read with section 149 or under section 302 read with section 34. The point has therefore no force."

In the present case, having regard to the whole tenor of the trial, to the Judge's summing-up and to his subsequent questioning of the jury as read in the light of that summing-up we are of the opinion that so far as the appellants are concerned the intention of the jury and their true verdict was that each of the appellants was guilty of culpable homicide not amounting to murder in contravention of section 304.

The jury had in effect been told that if they were satisfied that there was an unlawful assembly of five or more persons having the common object of causing hurt and that these persons knew that murder was likely to be committed and that murder was committed, then it was open to them to convict each of the persons concerned of murder or manslaughter as the case might be because of the provisions of section 149. They were then told that if there was an assembly which was not unlawful only by reason of its consisting of less than five persons then it was open to them on the evidence to convict the persons concerned of murder or manslaughter as the case might be by reason of section 34 if they were satisfied that each of these persons took part in the killing in prosecution of a common intention to kill, an expression which was explained to them at great length.

In the event there was some confusion as to the case of the woman standing number six on the Charge Sheet with whose case we are not concerned here as she has been acquitted and in effect they decided that she was not guilty of any offence. That was a verdict of not guilty so far as she is concerned. As regards the four appellants, they clearly reconsidered the position in the light of the consideration which had already been fully explained, that being only four in number they did not constitute an unlawful assembly. They were asked if the appellants or one of them killed but did not murder the deceased Mohamed Ali. The terms of that question considered in isolation were not happy but in view of all that had been said by the Judge in his summing-up and in view of what the jury had already said to the effect that each of the appellants was guilty of manslaughter and unlawful assembly they could only interpret that question by the Judge as being whether they meant that, having regard to the provisions of section 34, they were still of the opinion that these appellants were guilty of manslaughter. And the answer to that question was "yes".

In the circumstances we are compelled to dismiss the appeal but in pursuance of our powers under section 29(1) of the Courts Ordinance we vary the judgment of the High Court by substituting in the case of each of the appellants a judgment of culpable homicide not amounting to murder in contravention of section 304 for the judgment entered under sections 304 and 149.

*Appeal dismissed.*

Solicitors: *S. Seenivasagam & Son*; *Khong & Son.*

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## RAMASAMY CHETTIAR v. WONG POH FATT

[O. C. J. (Pretheroe J.) October 4, 1956]

[Ipoh — Originating Summons No. 59 of 1956]

*Money and Moneylending — Statement of account - Production of — Moneylenders Ordinance, 1951, s.21(1) — Non-compliance with.*

When a moneylender embarks on any proceedings in any Court, a statement of his account as prescribed by section 21 (1) of the Moneylenders Ordinance, 1951 must be produced at the time the Originating Summons was filed. Non-compliance with this statutory requirement is an irregularity which the Court cannot waive and will entitle the respondent to have the Originating Summons dismissed with costs.

*Arjan Singh* v. *Hashim Angullia* [3] followed.

[Editorial Note: section 21(1) of the Federation Moneylenders Ordinance, 1951 corresponds to section 22 of the Singapore Moneylenders Ordinance, 1959].

*Cases referred to:—*

(1) *Guthrie* v. *Fisk*, 8 B. & C. 178.

(2) *In re Nance*, [1893] 1 Q.B. 178.

(3) *Arjan Singh* v. *Hashim Angullia & Ors.*, [1941] M.L.J. 55.

ORIGINATING SUMMONS.

*W. J. Huntsman* for the applicant.

*K. C. Chan* for the respondent.

**Pretheroe J.:** This is an application initiated by way of an Originating Summons

calling upon the respondent to show cause why certain charged lands of his shall not be sold by public auction in satisfaction of a debt due to the applicant. It was opposed in chambers and adjourned into open Court for argument.

At the hearing Mr. Chan, for the respondent, had two preliminary objections. As he is, in my opinion, entitled to succeed on one of them I need only refer briefly to the other. That was that "proceedings" should have been taken by way of a civil suit and not by Originating Summons. The basis of Mr. Chan's submission was that section 21(1) of the Moneylenders Ordinance, 1951, provides that "where proceedings are taken in any Court" by a moneylender for the recovery of any money lent" etc. and the meaning of the word "proceedings" is made clear by the marginal note which reads "Account . . . to be produced when *suing* in Court." In reply Mr. Huntsman, for the applicant, submitted that the words of the Ordinance must be construed strictly (*Guthrie* v. *Fisk*[1] and *In re Nance*[2]). The word "proceedings" embraces all forms of action instituted in Courts and its meaning cannot be circumscribed by the marginal note which, in any case, is not part of the Ordinance.

On this submission I favour the view put forward by Mr. Huntsman and overrule the objection on that ground.

Mr. Chan's second objection was that section 21(1) of the Ordinance provides that "where any proceedings are taken in any Court by a moneylender . . . . . he shall produce a statement of his account . . . ." This, Mr. Chan submitted, means "shall produce at the time the Originating Summons" (in this application) "was filed". In this case respondent had not been supplied with a copy of the account up to the time when the application was first argued. In Mr. Chan's submission this non-compliance with a statutory requirement is an irregularity which the Court cannot waive. (*Arjan Singh* v. *Hashim Angullia & ors.*[3]). Mr. Huntsman had no answer to this but asked for an adjournment and immediately filed a copy of the account. In my opinion, for the reasons stated by Terrell J.A., in *Arjan Singh's* case, this has not cured the irregularity as respondent had filed his counter-affidavit before seeing the account. Thus I feel bound to follow the ruling in *Arjan Singh's* case and consequently dismiss the application with costs to respondent.

*Application dismissed.*

Solicitors: *Maxwell, Kenion, Cowdy & Jones; K. C. Chan.*

## DOWSE v. DOWSE

**[O. C. J. (Rigby J.) November 6, 1958]**

**[Penang — Divorce Petition No. 3 of 1956]**

***Divorce — Discretion — Constructive desertion — What is — Husband's petition — Presumption of continuing desertion — Deserted spouse's confession of adultery — Maintenance of wife even though guilty party.***

This was a husband's petition for divorce on the ground of desertion. The respondent denied that she was guilty of desertion and in defence alleged constructive desertion on the part of the petitioner. She prayed for a decree to be granted in her favour and accordingly lodged a Discretion Statement which revealed adultery on her part. The issue before the Court was whether she had sufficient justification in law to entitle her to leave the matrimonial home.

**Held:** (1) on the evidence established, constructive desertion on the part of the petitioner was not proved within the meaning of *Lang* v. *Lang*[1]; a deserted spouse is under no obligation to show he wanted the return of the other spouse. Hence the respondent was not justified to leave the matrimonial home and a decree nisi was granted.

(2) the power of the Court to award maintenance extends not only to an innocent but also to a guilty party and depends upon the circumstances in each case.

[**Editorial Note:** A decree nisi granted to the petitioner on February 8, 1956, was rescinded by Rigby J. on July 6, 1957, on the grounds of collusion, the Attorney-General showing cause ([1957] M.L.J. 12). On November 6, 1958, the petitioner again obtained a decree nisi which was again rescinded by Rigby J. on January 22, 1960, on the intervention of the Attorney-General, on the ground of the petitioner's own undisclosed adultery. On the evidence established, Rigby J. held that ". . . . It should be clearly understood that where a petitioner seeks for divorce and has himself been guilty of the matrimonial offence of adultery, it is his duty fully to disclose that fact to the Court in what is known as a "discretion statement" and ask for the discretion of the Court to be exercised in his favour . . ." On the facts found the petitioner had wilfully and deliberately suppressed the facts of his own adultery and the decree nisi was accordingly rescinded.]

*Cases referred to:—*

(1) *Lang* v. *Lang*, [1955] A.C., 402; [1954] 3 W.L.R. 762; [1954] 3 All E.R. 571, P.C.

(2) *Sifton* v. *Sifton*, [1939] P. 221; [1939] 1 All E.R., 109.

(3) *Church* v. *Church*, [1952] P. 313; [1952] 2 All E.R. 441.

(4) *Clueit* v. *Clueit*, [1958] 1 W.L.R. 463; [1958] 1 All E.R. 417.

(5) *Clear* v. *Clear*, [1958] 1 W.L.R. 467; [1958] 2 All E.R. 353.

(6) *Sydenham* v. *Sydenham & Illingworth*, [1949] 2 All E.R. 196; 65 T.L.R. 489.

DIVORCE PETITION.

*R. H. Green* for the petitioner.

*Lim Ewe Hock* for the respondent.

**Rigby J.:** This case has taken a great deal of time and a considerable volume of evidence has been heard, but having regard to the view that I have clearly formed on the evidence I consider that no useful purpose can be served by my reserving judgment.

This is a husband's petition for divorce on the ground of desertion without reasonable cause for the necessary statutory period of at least three years immediately preceding the presentation of the petition. The Petition was presented on the 20th August, 1956. The respondent, by her answer, denied that she was guilty of desertion. She further prayed for a decree to be granted in her favour on the ground that the petitioner had himself been guilty of physical cruelty and/or by his conduct and treatment of her he had compelled her to leave the matrimonial home and so he himself had been guilty of desertion.